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No. 00-99

IN THE

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, *et al.*,
Petitioners,

v.

COMMUNITIES FOR EQUITY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held that the district court's order denying the Michigan High School Athletic Association's motion for summary judgment neither warrants the extraordinary relief of granting a writ of mandamus nor is an appealable collateral order.

LIST OF PARTIES

The parties to the proceedings below include Respondents Communities for Equity, on behalf of itself, its members, and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated. The Petitioners are the Michigan High School Athletic Association, on behalf of itself and its members; John Roberts; Keith Alto; Geraldine David; Keith Eldred; Paul Ellinger; Eric Federico; Dan Flynn; Margra Grillo; Robert Grimes; Eunice Moore; Norm Johnson; Dewayne Jones; Dennis Kniola; William Newkirk; Thomas Rashid; Robert Riemersma; Randy Salisbury; Joyce Seals; Michael Shibler; and Christi Brilinski.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Sixth Circuit's holding that the district court's denial of the Michigan High School Athletic Association's motion for summary judgment neither warrants a writ of mandamus nor is an appealable collateral order.

STATEMENT OF THE CASE

On June 26, 1998, Respondents Communities for Equity, a non-profit membership organization of students and parents dedicated to the promotion of gender equity in Michigan secondary school athletics, and parents of two female student-athletes (collectively "CFE"), filed a class action lawsuit

against the Michigan High School Athletic Association and members of its Representative Council (collectively "the MHSAA"). The complaint alleges that the MHSAA discriminates against female students by denying them equal participation opportunities and equal treatment and benefits, including but not limited to: refusing to sanction certain sports that girls want to play; requiring girls to play in non-traditional seasons; and providing inferior athletic facilities for girls' tournaments as compared to those provided for boys' tournaments. CFE alleges that the MHSAA's actions violate Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.3101 *et seq*. Pet. App. 3-2.

The MHSAA filed renewed motions for summary judgment on September 1, 1999 with respect to the federal claims, stating that it is not covered by Title IX or the Equal Protection Clause. On January 21, 2000, the district court denied the MHSAA's motions, holding that (1) there is a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics;[1] and (2) the MHSAA is a state actor and thus bound by the Equal Protection Clause. Pet. App. 3-1 to 3-38.

On February 15, 2000, the MHSAA requested a writ of

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[1] The district court accepted CFE's "controlling authority" argument, specifically left open by this Court in *NCAA v. Smith*, 525 U.S. 459 (1999). This argument posits that because Michigan school districts have "ceded control" over interscholastic athletics to the MHSAA, and because interscholastic athletic programs receive federal financial assistance, MHSAA has control over a federally funded educational activity and hence is subject to Title IX. Pet. App. 3-5 to 3-14.

mandamus directing the district court to dismiss the Title IX and Equal Protection Clause claims; alternatively, the MHSAA asked the Sixth Circuit to review the district court's decision pursuant to 28 U.S.C. § 1291. On March 6, 2000, the MHSAA filed a petition with the Sixth Circuit seeking permission to appeal pursuant to 28 U.S.C. § 1292(b). On March 21, 2000, in two separate orders, the Sixth Circuit denied the MHSAA's mandamus petition, its alternative request to construe the petition as a notice of appeal under 28 U.S.C. § 1291, and its permission to appeal pursuant to 28 U.S.C. § 1292(b). Pet. App. 1-1, 2-1. On March 31, 2000, the MHSAA filed a petition with the Sixth Circuit for rehearing *en banc* of both of the court's rulings. On May 16, 2000, the Sixth Circuit denied the MHSAA's petition for rehearing of the mandamus petition and held that "such relief is not available with respect to the denial of the petition for leave to appeal." Pet. App. 1-1.

REASONS FOR DENYING THE WRIT

I. THERE IS NO FINAL JUDGMENT IN THIS CASE

"Except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The lack of a final judgment below may "of itself alone" provide "sufficient ground for the denial of the application." *Id.* In this case, the MHSAA concedes that a denial of a motion to dismiss[2] generally is interlocutory in nature and therefore not appealable. *United States v. Florian*, 312 U.S. 656 (1941); 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2715 (1998). The MHSAA nevertheless argues that the district

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[2] The MHSAA describes the district court's order underlying its petition as a denial of a motion to dismiss, but the district court and Respondents construe the order as a denial of summary judgment. Pet. App. 3-1 to 3-38.

court's decision is an appealable collateral order under 28 U.S.C. § 1291 because the grounds for its summary judgment motion -- that it is not covered by Title IX or the Equal Protection Clause -- are analogous to an immunity claim. Like denials of summary judgment based on immunity, the MHSAA asserts that the denial of summary judgment in this case should be appealable as a collateral order. Its argument cannot prevail.

In *Cohen v. Beneficial Industrial Loan Corp.*, this Court set forth the criteria for when a district court's order is appealable under 28 U.S.C. § 1291: if it falls within the "small class" of decisions that are conclusive, that resolve questions separate from the merits and collateral to rights asserted in the action, and that are effectively unreviewable on appeal from the final judgment in the underlying action. 337 U.S. 541, 546 (1949). The district court's decision in this case does not meet any of these criteria.

First, the district court's order does not decide conclusively whether the MHSAA is subject to Title IX, let alone whether the association has discriminated against female athletes in violation of Title IX and the Equal Protection Clause. The district court merely allowed the case to proceed to trial. Therefore, the decision fails the *Cohen* test, which "disallow[s] appeal from any decision which is tentative, informal or incomplete." *Id.*

Second, the district court's decision does not address questions separate from the merits of the case. CFE's claims that the MHSAA is subject to Title IX and the Equal Protection Clause are part of the claims on the merits and hence are not collateral. *E.g., compare United States v. MacDonald*, 435 U.S. 850, 859-60 (1978) (pretrial denial of speedy trial claim not separable from principal issue of accused's impending trial - his guilt or innocence) *with Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-72 (1974) (quoting *Cohen*, 337 U.S. at 546-47)

(order requiring defendant to pay costs of notices in class action was "'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it'"). Moreover, an order is not collateral if it is merely a step towards final judgment in which it will merge. *Cohen*, 337 U.S. at 545-47; 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3911 (1992). An order denying summary judgment is an interlocutory order that merges in the final judgment; therefore, the district court's decision in this case cannot be characterized as a collateral order. 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.28 (1992).

Third, the district court's denial of summary judgment is reviewable on appeal from the final judgment. After trial is completed in this case, the issues of whether the MHSAA is subject to Title IX and the Equal Protection Clause will be reviewable on appeal along with other claims on the merits. Moreover, the MHSAA's attempt to analogize its claim that it is not covered by Title IX and the Equal Protection Clause to immunity from suit must fail. As this Court stated in *Digital Equipment Corp. v. Desktop Direct, Inc.*, "[Section] 1291 requires courts . . . to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye" because "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" 511 U.S. 863, 873 (1994). "[T]he essence of . . . immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Unlike an immunity defense, however, the MHSAA's argument that it is not subject to these antidiscrimination laws is a "mere defense to liability," *Mitchell*, 472 U.S. at 526, and "[a]n erroneous ruling on liability may be reviewed effectively on appeal from final judgment." *Swint v. Chambers County Commission*, 514 U.S. 35, 43 (1995) (county commission's assertion that particular

sheriff was not its policymaker and hence could not confer municipal liability did not rank as immunity from suit under Supreme Court's decisions).

Therefore, the district court's order denying the MHSAA's summary judgment motion is not appealable as a collateral order, and there is no final judgment in this case.

II. THE MHSAA'S ARGUMENTS THAT THERE EXIST CONFLICTS WARRANTING THE GRANTING OF CERTIORARI MUST FAIL

The MHSAA contends that the district court's order denying its summary judgment motion and the Sixth Circuit's decision not to hear its interlocutory appeal leave in place a ruling that conflicts with a Michigan Supreme Court decision, four decisions of this Court, and two Sixth Circuit decisions. The MHSAA misstates the holdings of its cited cases in ways that create nonexistent conflicts.

The MHSAA's contention that the district court's order conflicts with the Michigan Supreme Court's ruling in *Kirby v. Michigan High School Athletic Ass'n*, 459 Mich. 23 (1998), is flatly wrong. *Kirby* does not remotely address the issues involved in this case -- i.e., whether a high school athletic association is subject to Title IX and the Equal Protection Clause and whether it discriminates against girls in violation of these laws. Rather, the case involves one school's objection to the MHSAA's decision to declare the school ineligible to participate in a particular tournament. The Michigan Supreme Court, in a *per curiam* opinion, held that "these schools voluntarily cede to the MHSAA full authority to regulate interscholastic athletics" and that "the MHSAA exercised its authority in the course of such governance." 459 Mich. at 36-39. On that basis, the court denied the member school relief. Thus, contrary to the MHSAA's argument in this case, not only

does *Kirby* provide no legal theories that would be applicable to CFE's claims, but the *Kirby* court's reasoning actually supports the "controlling authority" theory that the district court held valid.

With respect to the four purported conflicts with this Court's decisions, the MHSAA's arguments are again misplaced. First, in *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999), this Court held that the NCAA, assuming it receives no federal funds itself, is not subject to Title IX solely by virtue of its receipt of dues from its recipient member schools. 525 U.S. at 469. Importantly, this Court in *Smith* specifically acknowledged and left open the question of whether, "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient." *Id.* at 469-70. Therefore, the district court's decision not only does not conflict with *Smith*, but actually addresses an issue that *Smith* specifically stated should be addressed in the first instance by lower courts. *Id.* at 470.

Second, in leaving the "controlling authority" theory open in *Smith*, this Court specifically considered *United States Department of Transportation v. Paralyzed Veterans of America*. 477 U.S. 597 (1986) (addressing issue of whether beneficiary of federal funds is subject to Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*). Moreover, *Cannon v. University of Chicago*, 441 U.S. 677 (1979), which the MHSAA cites as the third conflicting Supreme Court case, certainly is a well-established precedent in Title IX jurisprudence and the *Smith* Court could have discussed it if it thought it was relevant to its decision in that case. Nothing in either *Paralyzed Veterans* or *Cannon* conflicts with this Court's decision in *Smith* to leave open the "controlling authority" theory as a basis for Title IX liability.

Fourth, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), also does not conflict with the district court's order because it does not address any of the issues raised in this case. *Davis* centered on the question of when a direct recipient of federal funds can be liable in monetary damages for a failure to prevent or stop student-on-student sexual harassment, not on whether an entity is a recipient or is otherwise covered by Title IX.

Finally, the MHSAA also erroneously claims that the district court's decision conflicts with two Sixth Circuit decisions. With respect to the first, this Court has granted certiorari in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 1156 (2000), and if its decision in that case is applicable to the equal protection claim in the instant case, the district court and Sixth Circuit will be bound by it.[3] In addition, the MHSAA twice advanced the same argument with respect to *Brentwood* before the Sixth Circuit in an attempt to appeal the district court's decision, but both times, the Sixth Circuit exercised its discretion not to hear the case. Furthermore, the district court's decision distinguishes *Brentwood* from this case, Pet. App. 3-35, and in any event, the Sixth Circuit will have an opportunity to review the case and *Brentwood*'s applicability if there is an appeal from final judgment. Second, *Soper v. Hoben*, 195 F. 3d 845, 854 (6th Cir. 1999), *cert denied*, 120 S. Ct. 2719 (2000), creates no conflict for the same reason that this Court's decision in *Davis* creates no conflict. In *Soper*, the Sixth Circuit simply applied the *Davis* standard to allegations that a school district mishandled complaints of student-on-student sexual harassment that occurred at federally funded Michigan schools.

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[3] It is important to note, however, that the equal protection claim is not dispositive of the case given the Title IX claim.

Therefore, there are no conflicts that would warrant a grant of certiorari by this Court.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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